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THE NEW ACT CONCERNING DEMURRERS TO EVIDENCE.

Judge A. A. Phlegar has presented his views as to the meaning of the new law, with his accustomed vigor and ability, but he bases his argument wholly upon the interpretation which the courts have placed upon the bill of particulars statute provided for in § 3249 of the Code of Virginia (1904). A careful reading of that statute will convince any one that it is not analogous to the demurrer act. A bill of particulars does not require an exact, *specific statement* of the grounds of complaint or defense, but only a written statement of the matter not described in the declaration or other pleading, "so plainly as to give the adverse party *notice* of its character." The words in quotation are taken from that statute. The office of a bill of particulars is to apprise the party of the demand of his adversary, and not to furnish him with his proofs, or the names of his witnesses. It is an amplification of the pleadings, as if the party had alleged generally that he had sustained damages in consequence of some act or other of his adversary, without disclosing the nature of the act. Marco *v.* Bird, 53rd N. Y. Supp. 411, 412. Being made *before* the trial, necessarily it can only state what one *expects* to prove. It was unknown to the common law and arose out of the use of common-law counts, in actions of debt and assumpsit.[1] Its purpose, broadly stated, is to prevent surprise and restrict proof, and this has been the interpretation put upon it by the Virginia court of appeals, as is admirably shown in the article of Judge Phlegar.[2] The effect of the bill is to limit the demand and restrict the proof to the matters set out.[3]

On the other hand, a demurrer to the evidence is put in when the evidence has all been taken and submitted; it comes at the end, whereas the bill of particulars is before the trial begins in court. The plain object of Judge Phlegar is to show that the

1. 3 Encyc. of Pl. & Pr. 518.
2. Newport News Ry. *v.* Bickford, 104 Va. —, 52 S. E. 1011.
3. Id 539.

legislature never intended to take from the courts the power of *"inferring the facts admitted to be true,"* to use the language of Roane, judge, in Harrison *v.* Brock, which was decided in 1810.[4] But it is impossible to give the courts the power to *infer facts* from a mass of confusing and contradictory evidence in the teeth of the requirement that "the party tendering the demurrer to evidence shall state in writing specifically the grounds of demurrer relied on." If that language does not take from the courts the power to *infer facts,* is it possible to use any language that would have such effect? The party tendering the demurrer must, himself, infer the facts and then give them specifically in his grounds of demurrer—"nor shall any other grounds of demurrer not thus specifically stated be considered." What harm can be done by requiring the demurrant to make certain what he does, in fact, admit to be true, and specifically to state such admission in writing? It was, in the opinion of the writer, the purpose of the legislature to make certain, in the interests of justice, all admissions, and to take away from the courts the power of *inferring what facts had been admitted.* The legislature intended to prevent the courts from drawing any inferences of fact which may arise in a jury trial. In matters concerning demurrers to evidence, no relief has ever come to litigants from rulings of the Virginia courts. This appears from § 2897 of the Code of Virginia and its history which provides that no demurrer to the evidence, or of any kind, shall preclude a jury from passing on insulting words.[5]

There is but one other state in the Union where it has been the practice to permit all of the evidence on both sides to be inserted in the demurrer.[6] It was illogical to the last degree to permit such practice.

The Kentucky court of appeals says: "The defendant could not, by demurring, cause his own evidence to be taken for true, and the court cannot, without usurping the province of the jury, decide upon its truth. In principle it is not less absurd for a party to demur to his own evidence, than it would be to demur to his own plea; and it is believed that there is no precedent to be

4. 1 Munfd. 37.
5. Rolland *v.* Batchelder, 84 Va. 674.
6. 6 Encyc. Pl. & Pr. 450.

found in the English books for the former, no more than for the latter practice."[7]

The purpose of the act was to set out in the demurrer only the admitted facts deducible from the evidence, and not, as before its passage, the whole evidence. The language of the act gives the court ample control by providing "and the demurree shall not be forced to join in the said demurrer until the *specific grounds upon which the demurrant relies are stated in writing,* nor shall any GROUNDS OF DEMURRER NOT THUS SPECIFICALLY STATED BE CONSIDERED." Human language can not be plainer; certainly, the English tongue. The reason the word "grounds" was used instead of "facts" was because some member desired to conform the new statute to § 3271 of the Code, relating to demurrers to declarations and other pleadings, where the language is "all demurrers shall be in writing, except in criminal cases, and in civil cases, the court, on motion of any party thereto, or of its own motion may, require the grounds of demurrer relied on to be stated specifically in the demurrer; and no grounds shall be considered other than those so stated;" no one had in mind the bill of particulars act but the above when the demurrer to evidence act passed.

The word "grounds" in § 3271 means not a general notice such as is provided for in the bill of particulars act, but the *exact* legal conclusion which is contended for on the written language used in the declaration, plea or other proceeding. The court of appeals so understands that act, as appears from the opinion of Judge Cardwell in Jones' Case, 100 Va. 853, where, delivering the opinion of the court, he says: "It has been the settled practice of this court to give the accused, in a criminal prosecution, the benefit of his demurrer to the indictment or his motion to quash the writ of *venire facias* for error apparent on its face, although the special grounds of the demurrer, or the motion to quash were not pointed out. The same practice in reference to demurrers to declarations in civil cases prevailed until recently, when the legislature saw proper to change the rule, and to require the party demurring to point out specifically the grounds of demurrer when requested by any party thereto, or of its own motion, and no grounds shall be considered other than those so

7. Woodgate *v.* Threlkeld, 3 Bibb (Ky.) 527.

stated. Acts 1899, 1900, p. 111." The act relating to demurrers to evidence clearly meant to get rid of unjust and illogical uncertainties.

Says one of the latest and ablest writers on Evidence: "Furthermore, a *demurrer to evidence,* the object of which is to raise a question of law, will, like other demurrers, have the effect of *admitting the facts conclusively.* It has the further common feature, frequent in a judicial admission, that it is made *after* issues formed and trial begun; but it is nevertheless, in this respect, like a motion to arrest judgment, merely a postponed pleading.[8]" In construing this act, the courts must necessarily hold, on the language used, that the *facts* must be admitted in writing by the party demurring *before* his grounds of demurrer can be stated *specifically,* because, as Mr. Wigmore expresses it, a demurrer is a judicial admission.

The object of the legislature plainly was to make the question to be determined clear, and to take away from the courts the right *"to infer the facts."* The language used, under a fair construction, accomplished the purpose, which was to deprive counsel representing the demurring party of the privilege of the "Heathen Chinee."

"With the smile that was childlike and bland," of taking out of his sleeve at any stage of the trial or game, a card, as needed, and puts him in the position of keeping his whole hand in sight.

S. S. P. PATTESON.

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8. 4 Wigmore on Evidence, § 2589, p. 3620.